

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Minnesota Department of Labor and
Industry,

Complainant,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER UPON DEFAULT**

vs.

Mike McKean Construction L.L.C.,

Respondent.

This matter is before Administrative Law Judge Barbara L. Neilson pursuant to a Motion for Default Judgment filed by the Commissioner of the Minnesota Department of Labor and Industry on December 13, 2013.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). There was no appearance by or on behalf of Mike McKean Construction L.L.C. (Respondent).

STATEMENT OF THE ISSUES

Whether or not the violations, abatement dates, and penalties set forth in Citation No. 1, Items 1 through 3, issued by the Department to Respondent on January 15, 2013, are appropriate and should be affirmed.

SUMMARY OF ORDER

The Administrative Law Judge concludes that Respondent is in default and therefore deems true and proven the allegations in the Summons and Complaint, as set forth in the Notice and Order for Hearing and Pre-Hearing Conference. Accordingly, Items 1 through 3 of Citation No. 1 are affirmed in their entirety.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Commissioner of the Department of Labor and Industry is responsible for the enforcement of the Minnesota Occupational Safety and Health Act (MNOSHA)¹ and the standards and rules adopted under that Act.²

2. Respondent is an employer engaged in the business of construction in Minnesota.

3. On January 7, 2013, the Department conducted a safety and health inspection of the Respondent's place of employment. It concluded that Respondent was in violation of MNOSHA in certain respects.

4. On January 15, 2013, the Commissioner issued a Citation and Notification of Penalty to Respondent setting forth alleged violations of MNOSHA.³ It included the following:

Citation 1, Item 1: alleged a serious violation of Minn. Stat. § 182.653, specified that the violation must be abated by February 8, 2013, and imposed a penalty in the amount of \$250;

Citation 1, Item 2(a): alleged a serious violation of 29 C.F.R. § 1926.501(b)(11), noted that the violation was corrected during the inspection, and imposed a penalty of \$1,750.00;

Citation 1, Item 2(b): alleged a serious violation of 29 C.F.R. § 1926.501(b)(13), noted that the violation was corrected during inspection, and imposed no penalty;

Citation 1, Item 3: alleged a serious violation of 29 C.F.R. § 1926.1053(b)(1), noted that the violation was corrected during the inspection, and imposed a penalty of \$1,375.00.⁴

5. Respondent filed a Notice of Contest with the Department in which it contested Citation 1, Items 1, 2(a), 2(b), and 3, in their entirety.⁵

6. On April 26, 2013, the Department served a Summons and Notice to Respondent and Complaint (Complaint) upon Respondent by mailing same to Respondent.⁶

¹ Minn. Stat. §§182.65 - 182.676.

² Minn. R. Ch. 5210.

³ Notice and Order for Hearing and Pre-Hearing Conference (appended to this Order as Attachment A), at Exhibit 2.

⁴ *Id.* at pp. 5-8.

⁵ Attachment A at p. 2; *see also* Attachment A, Ex. 1 at p. 2.

⁶ *Id.* at p. 1 (Affidavit of Debra L. Caswell dated April 26, 2013).

7. The Complaint and the cover letter sent to Respondent stated that a written Answer must be filed with the Department within 20 days following service of the Complaint. They also stated that failure to file an Answer may constitute waiver of the right to further participate in the proceedings and could result in dismissal of the Notice of Contest.⁷

8. The Respondent failed to file an Answer.⁸

9. On December 12, 2013, the Department mailed to Respondent a Notice and Order for Hearing and Pre-Hearing Conference with attached Exhibits 1 and 2 (Notice and Order for Hearing); Complainant's Notice of Motion and Motion for Default Judgment; Complainant's Memorandum of Law in Support of its Motion for Default Judgment; and an Affidavit of Jackson Evans.⁹

10. The Notice and Order for Hearing informed Respondent that a Prehearing Conference would be held in this matter on January 15, 2014, at 2:00 p.m., at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota.¹⁰

11. In conformity with Minn. R. 1400.5700, the Notice and Order for Hearing required that "[a]ny party intending to appear at the hearing must file a Notice of Appearance form and return it to the Administrative Law Judge within 20 days of the date of service" of the Notice and Order for Hearing.¹¹

12. In conformity with Minn. R. 1400.6000, the Notice and Order for Hearing in this matter also includes the following statements:

Respondent's failure to appear at the hearing or prehearing may result in a finding that the Respondent is in default, that Complainant's allegations contained in this Notice and Order may be accepted as true, and that Complainant's proposed action may be upheld.¹²

13. Respondent did not file a Notice of Appearance with the undersigned.

14. No one appeared at the January 15, 2014, Prehearing Conference on behalf of Respondent. No request was made for a continuance or other relief, nor was any communication received by the undersigned from Respondent prior to the Prehearing Conference.

⁷ Attachment A, Ex. 1 (Summons and Complaint).

⁸ Attachment B at 4 (Affidavit of Jackson Evans dated December 12, 2013).

⁹ *Id.* at 6 (Affidavit of Rachel Tess dated December 12, 2013). Complainant's Notice of Motion and Motion for Default Judgment, Supporting Memorandum, and Affidavit of Jackson Evans are appended as Attachment B.

¹⁰ Attachment A at 1.

¹¹ *Id.* at 3.

¹² *Id.* at 2.

15. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice and Order for Hearing, a true and correct copy of which is appended hereto as Attachment A, are taken as true, deemed proven, and incorporated by reference into these Findings of Fact.

16. The Complainant's Notice of Motion and Motion for Default Judgment (which, as noted in Finding 9 above, was mailed to Respondent at the same time as the Notice and Order for Hearing) notified Respondent that, to contest the Motion, Respondent must file a written response with the undersigned Administrative Law Judge within ten working days of the date the Motion was received.¹³

17. The Respondent failed to file a response to the Motion.

18. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice and Order for Hearing and attached Complaint, true and correct copies of which are appended hereto as Attachment A, are taken as true, deemed proven, and incorporated by reference into these Findings of Fact.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Minnesota Department of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 182.661 subd. 3.

2. The Respondent received due, timely and proper notice of the charges against it, and of its opportunity to respond to the Motion. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural requirements of statute and rule.

4. Minnesota Rules part 5210.0570, subpart 3, requires that the Respondent file an Answer within 20 days and, if the Respondent fails to do so, subpart 4 states that any allegation not denied is deemed admitted and any affirmative defense not asserted is deemed waived.

5. Under Minn. R. 1400.6000, when a party defaults by failing to appear at a Prehearing Conference without the prior consent of the Administrative Law Judge, the allegations and the issues set out in the relevant pleadings may be taken as true and deemed proved.

6. The Respondent is in default as a result of its failure to file an Answer to the Complaint and its failure to appear at the scheduled Prehearing Conference.

¹³ Attachment B at 1.

7. Based upon the facts set forth in the Notice and Order for Hearing and the attachments thereto, Respondent has violated Minn. Stat. § 182.653.

8. The penalties assessed by the Commissioner for Citation No. 1, Items 1 through 3, were appropriately calculated under Minn. Stat. § 182.666, and the citations should be affirmed in their entirety.

Based upon the Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED as follows:

1. The Notice of Contest filed by Respondent Mike McKean Construction, L.L.C., is dismissed.
2. Items 1, 2(a), 2(b), and 3 of Citation No. 1 issued to Respondent on January 15, 2013, are affirmed in all respects.
3. Respondent shall immediately pay a total penalty of \$3,375.00 to the Minnesota Department of Labor and Industry. A check or money order in that amount should be made payable to "Minnesota Department of Labor and Industry, MNOSHA" and sent to Minnesota Department of Labor and Industry, Occupational Safety and Health Division, P.O. Box 64025, St. Paul, MN 55164-0025.

Minnesota law states that unpaid fines shall be increased to 125% of the original assessed amount if not paid within 60 days after the fine becomes a final order. After that 60 days, unpaid fines shall accrue an additional penalty of 10% per month compounded monthly until the fine is paid in full or until the fine has accrued to 300% of the original assessed amount.¹⁴

Dated: February 3, 2014

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Default (digitally recorded).

¹⁴ Minn. Stat. § 182.666, subd. 7.

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.